

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BEECHWOOD RESTORATIVE CARE CENTER,  
BROOK CHAMBERY, and OLIVE CHAMBERY,

Plaintiffs,

-vs-

LAURA E. LEEDS, EDMUND RUSSELL  
ALTONE, ROBERT W. BARNETT, ANNA D.  
COLELLO, ARLENE L. GRAY, HENRY M.  
GREENBERG, ANTONIO C. NOVELLO,  
STEVEN B. STEINHARDT, DENNIS P.  
WHALEN, SANFORD RUBIN, SUSAN T.  
BAKER, SHARON A. CARLO, CYNTHIA T.  
FRANCIS, NAOMI B. HAUSER, JOSEPH P.  
MOORE, MARY ELIZABETH RICH,  
and BARBARA W. SANER,

02-cv-6235

Defendants.

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**NOTICE OF MOTION *IN LIMINE***

MOTION BY: McConville Considine Cooman & Morin, PC

**-and-**

Geiger and Rothenberg, LLP  
Attorneys for Plaintiffs

DATE, TIME & PLACE: A Trial Term of this Court to commence on May 14,  
2012, in the United States Courthouse, 100 State  
Street, Rochester, NY 14614.

SUPPORTING PAPERS: Affidavit of David Rothenberg, Esq., sworn to on April  
25, 2012, and all prior pleadings and proceedings had  
herein.

RELIEF REQUESTED:

An Order an order granting a sanction against defendants for spoliation of evidence, together with such other and further relief as to the Court seems just, proper, and equitable.

ORAL ARGUMENT  
IS REQUESTED.

PLAINTIFFS INTEND TO  
SUBMIT REPLY PAPERS,  
IF NECESSARY.

Dated: April 25, 2012  
Rochester, NY

Kevin S. Cooman, Esq.  
McCONVILLE CONSIDINE COOMAN & MORIN, PC  
25 East Main Street, Suite 500  
Rochester, NY 14614

**-and-**

*s/ David Rothenberg*

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David Rothenberg, Esq.  
GEIGER and ROTHENBERG, LLP  
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Rochester, New York 14614  
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*Attorneys for Plaintiffs*

To: Gary M. Levine, Esq.  
Assistant Attorney General  
NYS ATTORNEY GENERAL'S OFFICE  
*Attorneys for Defendants*  
144 Exchange Boulevard, Suite 200  
Rochester, NY 14614

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Defendants.

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**AFFIDAVIT**

STATE OF NEW YORK  
COUNTY OF MONROE: ss.

**DAVID ROTHENBERG**, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the United States District Court for the Western District of New York.
2. I am a partner in the firm of Geiger and Rothenberg, LLP, co-counsel with McConville Considine Cooman & Morin, PC attorneys for plaintiffs in this action.
3. I make this affidavit in support of plaintiffs' motion *in limine* for an order imposing a sanction against the defendants for the loss or destruction of evidence.

4. Plaintiffs respectfully submit that the proof in this case will include testimony and Rule 36 admissions that relevant evidence has been lost or destroyed.

5. Such evidence will include, but will not be limited to, the following:

- Original notebooks of defendant Sharon Carlo, portions of which were copied and have been marked as Exhibit 29;
- Original file of Arlene Gray, former defendant in this action, regarding Beechwood Restorative Care Center; and
- Original enforcement file of the Department of Health, concerning the administrative revocation proceedings brought against Beechwood.

6. Upon information and belief, the proof will demonstrate that as of calendar year 1999, when the Beechwood revocation proceedings were under way, all of these original documents were in existence.

7. Annexed hereto as Exhibit A is a copy of Defendants' Response to Plaintiffs' Third Request for Admission. This response admits that defendants cannot produce the original Carlo notebooks (Exhibit A, ¶ 54), nor the original Gray file (Id. ¶ 56).

8. Further testimony will establish that defendants and other Department of Health officials were on notice of the need to preserve relevant evidence, owing to the pendency of various proceedings against DOH officials as well as various Freedom of Information Law requests.

9. Plaintiffs respectfully submit that a sanction will be warranted as a result of this spoliation of evidence. The precise sanction imposed by the Court will depend on the extent and quality of evidence of spoliation. The range of permissible sanctions includes:

- Directed verdict against the defendants;

- An instruction that certain facts are deemed admitted and true;
- An instruction mandating the jury to draw an adverse inference against the defendants; and
- An instruction permitting the jury to draw an adverse inference against the defendants.

See Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F.Supp.2d 456, 469-71 (S.D.N.Y. 2010)

10. Plaintiffs have submitted a proposed adverse inference instruction as proposed charge no. 9.

11. The instant motion is intended to give notice to the Court and defense counsel that plaintiffs may seek a more severe sanction, depending on the nature of proof in this case.

**WHEREFORE**, plaintiffs respectfully request the entry of an Order granting a sanction against defendants for spoliation of evidence, together with such other and further relief as to the Court seems just, proper, and equitable.

*s/ David Rothenberg*  
David Rothenberg, Esq.

Sworn to before me on the  
25<sup>th</sup> day of April 2012.

*s/ Beverly G. Evans*  
BEVERLY G. EVANS  
Notary Public in the State of New York  
Monroe County  
Commission Expires 10.30.2014

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Defendants.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2012, I electronically filed the foregoing motion *in limine* with the Clerk of the District Court using the CM/ECF system, which sent notice to the following:

1. Gary M. Levine, Esq.: gary.levine@oag.state.ny.us

*s/ Beverly G. Evans*

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Beverly G. Evans